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February 21, 2000

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Blanca S. Bayó, Director
Records and Reporting
Florida Public Service Commission
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399-0850

Re: Docket No. 991462-EU

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company ("FPL") in Docket No. 991462-EU are the original and fifteen (15) copies of Florida Power & Light Company's Motion for Reconsideration of Portions of Order No. PSC-00-0291-PCO-EU.

If you or your staff have any questions regarding this filing, please contact me.

Very truly yours,

Charles A. Guyton
Charles A. Guyton

Enclosure
cc: Parties of Record

TAL 1998/33467-1

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[Signature]
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DOCUMENT NUMBER-DATE

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination)
of Need for an Electrical Power)
Plant in Okeechobee County by)
Okeechobee Generating Company,)
LLC)
_____)

DOCKET NO. 991462-EU

Filed: February 21, 2000

**FLORIDA POWER & LIGHT COMPANY'S
MOTION FOR RECONSIDERATION OF PORTIONS
OF ORDER NO. PSC-00-0291-PCO-EU**

Florida Power & Light Company (FPL), pursuant to Rule 25-22.0376 of the Florida Administrative Code (F.A.C.), moves for reconsideration of those portions of Order No. PSC-00-0291-PCO-EU (the "Discovery Order") that deny FPL access to (i) the PG&E Generating Project Pro Forma for the Okeechobee Generating Project (the "PG&E Pro Forma") and the August 18, 1999, memorandum from Doug Egan to PG&E Generating's department heads (the "Memorandum"), (ii) the redacted portions of OGC's Precedent Agreement with Gulfstream Natural Gas System (the "Gulfstream Precedent Agreement"), (iii) the ABB Bid Summary for gas turbines, dated June 8, 1999, and related adjustment sheet (collectively, the "ABB Bid Summary") and (iv) project cost data, including cost of capital, development costs and detailed construction costs (collectively, the PG&E Pro Forma and Memorandum, the redacted portions of the Gulfstream Precedent Agreement, the ABB Bid Summary and the project cost data will be referred to herein as the "Confidential Documents"). FPL states the following in support of its motion for reconsideration:

1. FPL and Florida Power Corporation ("FPC") have requested through document production requests that OGC produce to them all of the Confidential Documents, and OGC has refused to do so. FPL and FPC filed motions to compel, and OGC filed motions for protective orders with respect to the Confidential Documents, all of which are summarized in the "Background" section of the Discovery Order. Oral argument was had before the Pre-Hearing Officer on February 7, 2000, concerning, *inter alia*, FPL's and FPC's right to access the Confidential Documents. Discovery Order at 3.

2. On February 11, 2000, the Pre-Hearing Officer issued the Discovery Order, which denies FPL and FPC access to any of the Confidential Documents. The stated rationale for denying access was, in all cases, that the Confidential Documents are proprietary, confidential business information pursuant to section 366.093(3), Florida Statutes, and that "FPL and FPC do not have a reasonable necessity for use of [the Confidential Documents] at hearing." Discovery Order at 8-12.

3. FPL respectfully requests the Commission to reconsider the Pre-Hearing Officer's decision to deny FPL access to the Confidential Documents. In particular, and for the reasons discussed below, FPL believes that the Pre-Hearing Officer erred in determining that FPL and FPC have no reasonable necessity for using the Confidential Documents at hearing.

4. As noted by the Pre-Hearing Officer, there is no dispute over the appropriate legal standard for analyzing FPL's right to access the Confidential Documents. OGC must first demonstrate that it is entitled to confidential treatment of those documents; then FPL must show that it has a reasonable necessity for the use of the documents at trial. Discovery Order at 7-8; *Becker Materials Corp. v. West Fla. Scrap Metals*, 407 So.2d 380 (Fla. 1st DCA 1981). FPL does not dispute in this motion the Pre-Hearing Officer's determination that OGC is entitled to confidential

treatment of the Confidential Documents. However, FPL believes that the Pre-Hearing Officer erred in concluding that FPL and FPC have no reasonable necessity to use those documents at hearing. The stated rationale for that conclusion misconceives the purpose of a need-determination proceeding and overlooks OGC's insidious efforts to undermine that purpose.

5. The Discovery Order accurately summarizes FPL's need for access to the Confidential Documents, as follows:

FPL and FPC state that OGC has placed the economic viability of its proposed plant at issue in this proceeding by asserting that the only support offered by OGC on this issue is witness Nesbitt's analysis using the Altos models, which is based on generic and hypothetical inputs rather than inputs specific to the proposed plant. FPL and FPC further assert that witness Nesbitt's analysis must be tested against PG&E's *internal analyses of the proposed plant's economic viability* to determine whether a different result would be reached using "real" data for the proposed plant. FPL and FPC contend that witness Nesbitt's analysis and generally available industry information are not sufficient to allow economic viability to be tested.

Discovery Order at 9. However, the Discovery Order goes on to reject FPL's concerns about needing to use the Confidential Documents at hearing, observing that

In addition to the data provided to support witness Nesbitt's analysis, substantial information from both outside and internal sources is available to FPL and FPC for the purposes of testing the economic viability of the proposed project..

Id. Thus, it does not appear from the Discovery Order that the Pre-Hearing Officer disputed FPL's reasons for needing the Confidential Documents in order to test Dr. Nesbitt's analysis against the actual conditions that OGC and its affiliates expect at the proposed plant; rather, the Discovery Order appears to reject the very notion that Dr. Nesbitt's analysis ought to be tested against those actual conditions.

6. Simply stated, the Discovery Order has foreclosed FPL's access to the Confidential Documents because it concludes that other available information provides an adequate substitute for

testing the asserted economic viability of OGC's proposed project. But this conclusion evidences a fundamental misconception about what need-determination proceedings should be. Such proceedings are not designed to reach hypothetical, academic conclusions about whether a generic type of power plant could benefit Florida; they are to determine whether a specific power plant is sufficiently justified that it should be permitted to consume valuable resources in this state. The Commission's rule on need-determination petitions makes this distinction clear, especially where, as here, the proposed project is to be justified on grounds other than strictly the reliability need for the project:

If a determination is sought on some basis in addition to or in lieu of capacity needs, such as oil backout, then detailed analysis and supporting documentation of the costs and benefits is required.

Rule 25-22.081(3), F.A.C.

7. If the Discovery Order's denial of access to the Confidential Documents is allowed to stand, the need determination in this docket will make a travesty of Rule 25-22.081, as well as the Commission's duty under section 403.519, Florida Statutes to determine whether the "proposed plant is the most cost-effective alternative available." OGC will present via Dr. Nesbitt an economic analysis of the proposed project that is, by his own admission,

based on assumptions and work performed by myself and my Altos colleagues.... They are not drawn from proprietary or confidential data from [OGC] or any of its affiliates nor are they drawn from analysis or data provided by [OGC]. ... My objective has been to apply and put forth my and Altos' best professional analysis and judgment based on our best available technology, experience and data, not to mirror [OGC's] analysis or projections.

Nesbitt direct testimony at 55. FPL and other intervenors, deprived of access to the Confidential Documents, will then be forced to critique Dr. Nesbitt's assumptions about the proposed project's

operating characteristics with either generic information on industry standards and averages for plants using similar technology or information on their own plants using similar technology. The end result of this critique -- whether it succeeds or fails -- will be that someone's view of industry standards and averages for gas-fired combined cycle technology will prevail. Under no possible outcome of the hearing will the Commission be left with any information about how the specific plant OGC plans to build in Okeechobee, Florida will actually perform. FPL can conceive no valid reason to structure the hearing so that it will reach this useless result.

8. The Commission need not undermine the effectiveness of the hearing in this proceeding merely to protect OGC's valid interests in confidentiality. OGC has stated that its need for confidentiality arises out of concern that FPL or its affiliates could use the Confidential Documents to improve their competitive position unfairly vis-a-vis OGC and/or its affiliates. *See* Discovery Order at 8, 11. But FPL proposed at the February 7 oral argument a complete answer to those concerns:

In order to accommodate OGC's stated concerns over disclosing the requested cost information and pro forma analyses to FPL or its affiliates, what we propose to you is to limit disclosure to FPL's outside counsels and its outside consultants with their entering into an agreement with OGC and whoever else it needs to be, that they will not further disclose that information to personnel at FPL or its affiliates. And this would fully address OGC's stated concern, which is that this information gets into the hands of FPL or FPL affiliate personnel who are competitors of OGC, and that, you know, those people can use it against OGC's competitive interests.

Tr. 39-40. The Pre-Hearing Officer asked FPL's counsel about the proposal at oral argument and did not appear to object to it (*see* Tr. 39-41); however, the Discovery Order does not even consider FPL's proposal. Instead, it considers and rejects a less-protective alternative that is, with all due respect, a straw man:

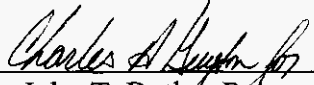
OGC contends that a protective order limiting the use of [the Confidential Documents] to litigation purposes in this case will not adequately protect the interests of PG&E Generating and OGC.

Discovery Order at 8. FPL concedes that merely limiting use of the Confidential Documents to the purposes of this proceeding might not adequately protect OGC's asserted confidentiality interests; that is why FPL proposed its more comprehensive solution. The Commission must allow discovery of confidential information that is essential to the proceedings in which it is sought, with whatever protections may be fashioned to avoid unnecessary hardship to the disclosing party. *See Goodyear Tire & Rubber Co. v. Cooley*, 359 So.2d 1200 (Fla. 1st D.C.A. 1978). FPL has proposed such protection, and the Commission clearly should give that proposal the serious consideration lacking in the Discovery Order.

WHEREFORE, FPL moves the Commission to reconsider the Discovery Order and to allow FPL access to the Confidential Documents under the terms of a protective order limiting such access to FPL's outside counsel and consultants and otherwise protecting against disclosure to FPL or its affiliates.

Respectfully submitted,

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By: 
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Attorneys for Florida Power
& Light Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this FPL's Motion for Reconsideration of Portions of Order No. PSC-00-0291-PCO-EU was served by Hand Delivery (*) or and U.S. Mail this 21st day of February, 2000, to the following:

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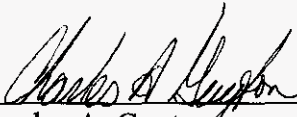
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